

June 27, 2013

Steven A. Mecum
City Councilmember
201 N. Harvard Avenue
Lindsay, CA 93247

Re: Your Request for Informal Advice
Our File No. I-13-060

Dear Mr. Mecum:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest.

QUESTION

Do the Act’s conflict-of-interest provisions prohibit your wife’s clients from participating in the city’s First Time Home Buyer Program (the “FTHB”)?

CONCLUSION

The Act does not prohibit your wife’s clients from utilizing the FTHB merely because of your elected position. The Act’s conflict-of-interest provisions apply only to the extent that you are making, participating in making, or using your position to influence a governmental decision. In light of your potential economic interests in your wife’s business, your wife’s clients, and your personal finances, we caution that you may be disqualified from making, participating in making, or using your position to influence any decisions regarding the FTHB including, but not

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

limited to, decisions involving Self Help Enterprises, the city's Loan Committee, or applications submitted by your wife's clients.

FACTS

You are currently a member of the Lindsay City Council and were elected to office in November 2012. Your wife is a real estate agent who works for Tienken Realty in the City of Lindsay.

As a real estate agent, your wife represents both buyers and sellers in real estate transactions in and out of the City of Lindsay. For the past fourteen years, your wife has represented clients who have received a portion of their home loan financing through the FTHB. Additionally, your wife is currently representing clients who may or will receive a portion of their home loan financing through the FTHB. The FTHB was started by the City of Lindsay long before you were elected. As implemented, the city uses a third party, Self Help Enterprises, to administer the program, and the city's Loan Committee is responsible for the final approval or denial of the loan applications. The Lindsay City Council does not review the Loan Committee's decisions. Based upon the facts provided, there does not appear to be any decisions involving the FTHB including, but not limited to, decisions regarding Self Help Enterprises or the Loan Committee pending before the Lindsay City Council at this time.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Are you a "public official" within the meaning of the Act?

As a city council member, you are a public official. Public officials are defined as "every member, officer, employee, or consultant of a state or local government agency." (Section 82048.)²

² If a public official's office is listed in Section 87200, which specifically includes city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

Step Two: Are you making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) For a decision before the official’s own agency, a public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of the agency. (Regulation 18702.3.)

Step Three: What are your economic interests?

Generally, to determine whether you have a disqualifying conflict of interest in any particular governmental decision, you must identify those economic interests that may be affected by the decision. Economic interests from which a conflict of interest may arise are defined in Section 87103 and Regulations 18703-18703.5 and include:

- An economic interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An economic interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income to the official, including commission income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to the official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in the official’s personal finances, including those of the official’s immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Of the economic interests recognized under the Act, those interests that may be implicated by your account of the facts are the following:

Tienken Realty and Wife's Clients:

"Income" is defined to include any community property interest in the income of a spouse. (Section 82030(a).) "Commission income" is defined as the "gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction." (Regulation 18703.3(c)(1).) For a real estate agent, the following are sources of commission income:

"(i) The broker and brokerage business entity under whose auspices the agent works;

"(ii) The person the agent represents in the transaction; and

"(iii) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker." (Regulation 18703.3(c)(2)(C).)

Your wife's income as a real estate agent is considered commission income from both Tienken Realty and your wife's actual clients. To the extent that your community property interest in your wife's income attributed to Tienken Realty or any of your wife's clients equals or exceeds \$500 in the 12 months prior to a decision, you have economic interests in Tienken Realty or the client as a source of income.

Personal Finances:

A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)

You have stated that you and the city council have no current involvement with the FTHB program or the approval of applications submitted by loan applicants, such as your wife's clients. The FTHB program is solely operated by a third party, Self Help Enterprises, and the city's Loan Committee is responsible for the final approval of FTHB applications. As addressed above, the Act's conflict-of-interest provisions apply only to the extent that you are making, participating in making, or using your position to influence a governmental decision. The Act does not prohibit your wife's clients from utilizing the FTHB program merely because of your elected position.

Nevertheless, in light of your potential economic interests in your wife's business, your wife's clients, and your personal finances, you may be disqualified from making, participating in making, or using your position to influence any decisions regarding the FTHB. For example, you may be prohibited from taking part in any city council decision regarding the FTHB including, but not limited to, decisions involving Self Help Enterprises and the city's Loan

Committee. You may also be prohibited from discussing a loan application submitted by one of your wife's clients with city staff. If you need additional assistance determining whether a governmental decision in which you may take part has a reasonably foreseeable financial effect on any economic interest you may have, you should seek additional advice describing the governmental decision.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heidi G. Kim
Legal Intern, Legal Division

HGK:jgl